

Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Irregular Migrants

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Abstract

Since the 1980s, an increasing number of people have crossed international borders outside of formal, regularised migration channels, whether by land, air or sea. Policy debates on these kinds of movements have generally focused on security and control, to the neglect of a focus on rights. In a range of situations, though, irregular migrants, who fall outside of the protection offered by international refugee law and UNHCR, may have protection needs and, in some cases, an entitlement to protection under international human rights law. Such protection needs may result from conditions in the country of origin or as a result of circumstances in the host or transit countries. However, this article argues that, despite the existence of international human rights norms that should, in theory, protect such people, there remains a fundamental normative and institutional gap in the international system. Rather than requiring new hard law treaties to fill the gap, the article argues that a ‘soft law’ framework should be developed to ensure the protection of vulnerable irregular migrants, based on two core elements: firstly, the consolidation and application of existing international human rights norms into sets of guiding principles for different groups; secondly, improved mechanisms for inter-agency collaboration to ensure implementation of these norms and principles. The article suggests that learning from the precedent of developing the Guiding Principles on Internal Displacement, and its corresponding institutional framework, could be particularly instructive in this regard.

1. Introduction

Since the 1980s, an increasing number of people have crossed international borders outside of formal, regularised migration channels. These irregular movements have taken place by land, air and sea, and are both South-North and South-South. The motives for irregular trans-boundary movement are frequently complex and mixed, and the people moving in irregular ways often do not fit neatly into the category of either ‘refugee’

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or 'voluntary, economic migrant'.¹ A complex range of often interrelated factors – including the environment and nature, conflict, and the international political economy – contribute to create the imperatives and incentives for people to leave their countries and cross international borders, sometimes within the region of origin and sometimes trans-continently. The UN High Commissioner for Refugees, Antonio Guterres, has described this phenomenon as 'people on the move' and outlined one of his priorities as being to clearly identify where there are protection needs within such irregular population movements.²

UNHCR's overriding concern within this context has been to ensure the protection of refugees within broader migratory movements. In accordance with its mandate, UNHCR has a responsibility to ensure that refugees are identified and receive access to protection and durable solutions. UNHCR's task has been made more complicated by the existence of the so-called 'asylum-migration nexus', whereby refugees and other irregular migrants often use the same routes, have overlapping motives for movement, and are met by undifferentiated responses from states.³ Within this context, UNHCR has made it a priority to ensure that refugees have access to territory and procedures. It has unveiled a '10-point plan' to address mixed movements within a clear and principled framework, and this framework is currently being implemented in the context of, for example, mixed flow migration across the Mediterranean.⁴

However, as has been argued by the High Commissioner and senior staff within UNHCR, there is a need to go beyond the nexus and to ensure that the protection needs of other groups of irregular migrants are also met.⁵ Indeed there has been a longstanding recognition that other categories of vulnerable migrant beyond refugees are also in need of international

¹ UNHCR has had a longstanding recognition that there is a complex inter-relationship between migration and refugee protection. E.g., as early as 1993, UNHCR highlighted the ambiguity in the refugee/migrant distinction, UNHCR, *The State of the World's Refugees: The Challenge of Protection* (Oxford University Press, 1993), ch. 5. Meanwhile, in 1995, it even discussed protection in the context of 'people on the move', UNHCR, *The State of the World's Refugees: In Search of Solutions* (Oxford University Press, 1995), ch. 5. In 2002, High Commissioner Sadako Ogata set up a working group on migration within UNHCR, see, J. Crisp and D. Dessalegne, 'Refugee Protection and Migration Management: The Challenge for UNHCR', *New Issues in Refugee Research*, Working Paper no. 64 (UNHCR, Geneva, 2002).

² Opening Statement by Mr António Guterres, United Nations High Commissioner for Refugees, High Commissioner's Dialogue on Protection Challenges, Theme: Refugee Protection, Durable Solutions and International Migration, Geneva, 11-12 Dec. 2007, <<http://www.unhcr.org/research/RESEARCH/47fe0e532.pdf>>.

³ S. Castles and N. Van Hear, 'The Migration-Asylum Nexus: Definition and Significance', lecture presented at COMPAS, Oxford University, 27 Jan. 2005.

⁴ UNHCR, 'Refugee Protection and Mixed Migration: A 10-Point Plan of Action', 2007; Erika Feller, interview with UNHCR's Senior Public Information Officer, William Spindler, Dec. 2007; both at: <<http://www.unhcr.org>>.

⁵ J. Crisp, 'Beyond the Nexus: UNHCR's Evolving perspective on Refugee Protection and International Migration', *New Issues in Refugee Research*, Working Paper no. 155 (UNHCR, Geneva, 2008).

protection.⁶ Beyond refugees, there are two analytical groups of protection needs within the context of irregular migration. These can be described as: (i) protection needs resulting from conditions in the country of origin unrelated to conflict or political persecution, and (ii) protection needs arising as a result of movement.

First, an increasing number of irregular migrants have protection needs resulting from conditions in the country of origin unrelated to conflict or political persecution. These may arise from climate change, environmental degradation, natural disaster or serious economic and social distress, for example. There has been a growing recognition that an increasing number of people may be thought of as 'survival migrants'. They may leave their countries as a result of desperate economic and social situations, but do not conform to the 1951 Convention definition of a refugee. Three broad categories of people stand out as having unfulfilled protection needs as a result of conditions in the country of origin: a) people who may be considered as 'neither/nor' groups, who flee desperate economic and social distress, for example, resulting from state collapse, who are in need of some form of subsidiary protection, but who are not 1951 Convention refugees; b) people who flee natural disasters, such as tsunamis, earthquakes and flooding, to whom UNHCR is increasingly providing protection but who have no clear legal status and for whom operational responses are *ad hoc*; c) people who are displaced by causes related to environmental degradation or the consequences of climate change.⁷

Second, an increasing number of irregular migrants have protection needs arising as a result of movement. Irregular migration is a dynamic process and people's circumstances can change dramatically during transit between the country of origin and their destination. The range of barriers to movement created by states to control migration, and the increasing importance of smugglers and traffickers, have contributed to making irregular migration treacherous. Irrespective of the reasons why a person left her country of origin, she may face threats to her human rights that emerge during the process of movement. Four particular groups of people stand out as amongst those in need of protection as a result of the circumstances of transit: a) stranded migrants may face particular vulnerabilities as a result of being caught in transit without any means to move onwards with

⁶ Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* (GCIM, Geneva, 2005), ch. 3.

⁷ E. Piguet, 'Climate Change and Forced Migration', Working Paper no. 153 (UNHCR, Geneva, 2008); S. Castles, 'Environmental Change and Forced Migration: Making Sense of the Debate', Working Paper No. 70 (UNHCR, Geneva, 2002); Norwegian Refugee Council, 'Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration' (NRC, Oslo, 2008).

their journey or back to their country of origin;⁸ b) trafficked persons may face vulnerabilities that stem from being forcibly moved for purposes of exploitation;⁹ c) victims of trauma and violence in transit may have particular needs that make it inappropriate to simply return them to their country of origin;¹⁰ d) forcibly expelled migrants may face violence and human rights abuses in their host states or upon return to the country of origin.

In both of these analytical categories, legal norms already exist that apply to the human rights of vulnerable migrants. International Migration Law offers a compendium of international legal obligations that relate to migration. Within this overarching framework, international human rights law, in particular, highlights a range of obligations that states already have towards vulnerable migrants.¹¹ However, despite the fact that many relevant norms already exist, there are nevertheless two major gaps in the protection framework for vulnerable migrants that need to be addressed. First, there is a lack of clear guidance on the application of existing human rights norms to the situation of vulnerable irregular migrants. Second, there is a lack of clear division of responsibility among international organisations for the protection of vulnerable migrants, especially on an operational level. These gaps pose problems because they lead to unfulfilled protection needs and also to a lack of guidance for states on how to respond to these protection needs.

There has been growing international concern regarding the human rights of irregular migration, and the recent history of the issue has highlighted this. During the last ten years, shocking images of migrants in distress have been increasingly evident in the media. In the Mediterranean, the Canary Islands, the Gulf of Aden, the Maghreb, Southern Africa, the US-Mexican border region, the Caribbean, Turkey and the Balkans, and South-East Asia, images of drowning at sea, asphyxiation, physical abuse and harassment, and detention in unacceptable conditions have heightened awareness of the vulnerability of irregular migrants.¹² In 2005, the Report of the Global Commission on International Migration (GCIM) raised the issue of the human rights of such migrants, arguing that states 'should fulfil their responsibility and obligations to protect the

⁸ S. Grant, 'The Legal Protection of Stranded Migrants', in Cholewinski *et al* (eds.), *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser, Hague, 2007), 29-48.

⁹ R. Piotrowicz, 'Trafficking of Human Beings and their Human Rights in the Migration Context' in Cholewinski, *ibid.*, 275-90.

¹⁰ ICMC, 'First Aid, Recovery and Referral: Guaranteeing Protection to Migrant Victims of Violence in a Distinct Period of Need', 8 May 2008.

¹¹ Cholewinski *et al*, above n. 8; R. Perruchoud and K. Tomolova (eds.), *Compendium of International Migration Law Instruments* (TMC Asser, The Hague, 2007).

¹² See, e.g., 'Refugee or Migrant? Why it Matters?' (2007) 148 *Refugees* 4-11.

rights of migrants', and highlighting the specific protection needs of groups such as smuggled and trafficked human beings, and victims of abuse and exploitation.¹³ The Council of Europe (CoE) passed a resolution on the 'Human Rights of Irregular Migrants' in 2006, based on outlining member states' existing treaty obligations.¹⁴ It has followed this up with a number of meetings at its European Committee on Migration (CDMG), at which it has acted in a number of concrete ways to develop standards relating to the protection of vulnerable migrants.¹⁵ Meanwhile, the International Federation of Red Cross and Red Crescent Societies (IFRC) has become increasingly active in recognising the protection needs of irregular migrants. In November 2007, international migration appeared on the agenda of the International Conference of the Red Cross and Red Crescent for the first time, and the Movement passed a resolution aimed at addressing the humanitarian needs that result from cross-border population movement.¹⁶ In December 2007, UNHCR convened the first High Commissioner's Dialogue on Protection Challenges, which focused on the theme of 'Refugee Protection, Durable Solutions and International Migration'. The Dialogue recognised the gaps in protection that exist for non-refugees and the need for the international community to find ways to address these gaps.¹⁷ Building upon this, there has been growing NGO activism in support of ensuring that irregular migrants have access to human rights, notably led by the International Catholic Migration Commission (ICMC).¹⁸ Meanwhile, IOM has increasingly highlighted the way

¹³ GCIM, above n. 6, 32-3.

¹⁴ Council of Europe, Parliamentary Assembly, Resolution 1509 (2006) on the 'Human Rights of Irregular Migrants', <<http://assembly.coe.int>>.

¹⁵ Since 2007, the CDMG of the Council of Europe (CoE) has been extremely active in the area of the protection of vulnerable migrants. For example, it has prepared Draft Terms of Reference for Proposed CDMG Activity in Respect of People on the Move Who Suffer Trauma in Transit (Strasbourg 6 May 2008 mig\cdmg2008\docs) and the Abridged Meeting Report, including the Project Proposal for Protecting the Human Rights and Dignity of Vulnerable Migrants (Strasbourg 23 May 2008 mig\cdmg\docs). Furthermore, the CDMG has developed a Draft Recommendation, dated 20 May 2008, on 'Europe's "boat-people": Mixed Migration Flows by Sea into Europe'. The CoE also convened the first meeting, at which all of the relevant international organizations (ICMC, IFRC, IOM, UNHCR) were present, in Apr. 2008 in Geneva, to discuss possible TORs for the development of standards.

¹⁶ News Release, 'Red Cross and Red Crescent Conference Rallies International Community to Tackle Humanitarian Challenges', 30 Nov. 2007; Resolution 5 on 'International Migration' passed by the Council of Delegates at the 30th International Conference of the Red Cross and Red Crescent, 23-4 Nov. 2007.

¹⁷ UNHCR has set up a web page for documents relating to the Dialogue, <<http://www.unhcr.org/protect/473db6522.html>>.

¹⁸ ICMC has, e.g., drafted and submitted a proposal on 'The Development of international standards and response mechanisms for the reception and care of vulnerable migrants in mixed flows' to the European Commission's Call for Proposals under the Thematic Programme of Cooperation with Third Countries in the Area of Migration and Asylum, EuropeAid/126364/C/ACT/Multi.

in which a number of its projects contribute to the protection of vulnerable irregular migrants.¹⁹

In this context, states have increasingly acknowledged a desire for clear guidance on their human rights obligations towards vulnerable migrants. At the first High Commissioner's Dialogue on Protection Challenges in December 2007, states expressed broad consensus on the need for UNHCR to highlight and advise on existing protection gaps in the context of migration. The International Migration Organization's (IOM) chose the human rights of migrants as its theme for the International Migration Dialogue in 2009, and received a significant degree of support from states when highlighting the situation of vulnerable irregular migrants at its IOM Council in 2009.²⁰ Also, many states have expressed a desire for the human rights of migrants to become a more prominent aspect of the agenda of the Global Forum on Migration and Development (GFMD), it was a prominent theme in the 2008 Forum in Manila and it is expected to play an important role in Mexico at the 2010 Forum.²¹ Furthermore, at the 8th Session of the HR Council, a number of states – including Chile, on behalf of the Group of Latin America and Caribbean Countries (GRULAC), Slovenia, on behalf of the EU, the Philippines, Senegal, Brazil, and Turkey – spoke positively about the need to engage further in the protection of vulnerable migrants.²² There is consequently a growing desire among states for clearer guidance, and clearer institutional support at the international level, to enable them to refer, identify, protect and offer durable solutions to vulnerable irregular migrants.

In the current political climate, however, most states appear reluctant to commit to new formal multilateral agreements in relation to migration. The UN Convention on the Protection of the Rights of All Migration Workers and Members of their Families has been ratified by only forty-two states and most migrant receiving states appear to prefer to develop international cooperation in the area of migration through informal regional consultative processes (RCPs) or bilateral agreements rather than formal multilateral agreements. However, as this article argues, there is no need for the creation of new, binding norms in order to address the current protection gaps. The broad norms already exist, and states have already signed up to the relevant

¹⁹ IOM, 'Irregular Migration and Mixed Flows: IOM's Approach' (MC/NF/297), 19 Oct. 2009.

²⁰ *Ibid.*

²¹ Lecture given by Rolf Jenny, Special Advisor to the Chair-in-Office of the GFMD, on 'The Global Forum on Migration and Development', University of Oxford, 18 Jan. 2008.

²² UNHCR Summary of 8th Session of the Human Rights Council, 5 June 2008, e-mail, Christina Frentzou to UNHCR Colleagues.

human rights instruments.²³ The basis of an institutional framework also already exists. What is required is simply: a) an authoritative consensus on the application of these instruments to the situation of vulnerable migrants, and b) a clear division of responsibility between international organisations for the operational implementation of such guidelines.

A number of prominent legal scholars, notably, Stephanie Grant and the incoming Deputy High Commissioner for Refugees, T. Alexander Aleinikoff, have already argued that soft law can play an important role in consolidating existing norms into a clear and transparent understanding of the application of existing human rights norms to the situation of migrants.²⁴ In this regard, the international community's experience of developing a 'soft law' framework for the protection of internally displaced persons may offer a particularly instructive precedent.²⁵ There was long-standing acknowledgement that there was a significant normative and institutional gap in the international community's response to IDP protection. As with the situation of vulnerable migrants, the relevant human rights and international humanitarian law norms existed – however, there was a similar absence of clear guidelines on their application to IDPs and a lack of consensus regarding the appropriate division of organisational responsibility across the UN system. The process of developing a soft law framework for IDPs evolved between 1992 and 1998. On a normative and legal level, the international community did not try to create new binding norms on IDPs but took existing states' commitments in human rights law and international humanitarian law and set out concise, clear and authoritative guidelines on their application to IDPs. On an institutional level, the process clarified the division of responsibility between international organisations – on both a normative and operational level. It initially developed a 'collaborative' approach, which outlined the division of responsibility between UN agencies for IDP protection, and ultimately fed into the application of the 'cluster' approach of Inter-Agency Standing Committee (IASC) coordination.

Such a process of 'soft law' development could be analogously applied in order to develop the 'Guiding Principles on the Protection of Vulnerable Irregular Migrants' and to develop a clear operational division of responsibility among international organisations, analogous

²³ For an outline of these rights, see, e.g., R. Cholewinski, 'The Human and Labour Rights of Migrants: Visions of Equality' (2008) 22 *Georgetown Immigration Law Journal* 177-219.

²⁴ S. Grant, 'International Migration and Human Rights', a report prepared for the GCIM, Geneva, 2005, <<http://www.gcim.org/attachements/TP7.pdf>>; A. Aleinikoff, 'International Legal Norms on Migration: Substance without Architecture' in Cholewinski *et al.*, above n. 8, 467-79.

²⁵ S. Bagshaw, 'Responding to the Challenges of Internal Forced Migration: The Guiding Principles on Internal Displacement' in Cholewinski *et al.*, above n. 8, 189-202; C. Phuong, *The International Protection of Internally Displaced Persons* (Cambridge University Press, 2005); T. Weiss and D. Korn, *Internal Displacement: Conceptualization and Its Consequences* (London: Routledge).

to the ‘collaborative approach’ or by applying the ‘cluster approach’, for example. Such an approach could be developed *either* in relation to the overall category of ‘vulnerable irregular migrants’ *or*, more realistically, applied to specific sub-divisions of the issues, addressing, for example, survival migrants, trafficked persons, stranded migrants, or forcibly deported migrants separately – through sets of principals derived from existing international law, combined with clear divisions of inter-agency responsibility (whether through IASC or other mechanisms of inter-agency coordination).

In developing a soft law framework, UNHCR would not necessarily take on institutional responsibility for the protection of vulnerable migrants, which would be outside of its current normative and operational mandate. However, as a rights-based organisation with expertise in protection, it could play a facilitative role by designing and overseeing the process of negotiation of a soft law framework and a collaborative response to the implementation of that framework.

This article sets out the case for the development of a soft law framework on the protection of vulnerable irregular migrants. It is divided into four parts. Firstly, it sets out the problems with the status quo. Secondly, it outlines the case for a soft law framework (or frameworks). Thirdly, it outlines the case for developing a clear division of responsibility between existing international organizations in order to operationally implement the framework. Fourthly, it outlines the process through which such a framework – or series of frameworks – would be developed and facilitated at the international level.

2. Problems with the status quo

In order to make the case for developing non-binding standards on the protection of vulnerable migrants, it is important to begin by setting out what the problems are with the status quo that a soft law framework would attempt to address. Most obviously, the absence of clear guidelines on the application of the existing legal and normative structure to the situation of vulnerable migrants, and the lack of a clear operational division of responsibility between international organisations, leads to unfulfilled protection needs, which have significant consequences for migrants. Less obviously, though, these gaps also pose a number of problems for states, which stem from the absence of clear guidelines in relation to their protection obligations towards vulnerable migrants. The problems can be explained in turn.

2.1 Unfulfilled protection needs

At the international level, there is no clearly defined institutional framework for the protection of vulnerable irregular migrants. This contrasts with the institutional structures that exist in relation to the protection of

refugees or regular labour migrants. In relation to the former, international refugee law provides a clear normative and legal framework for the identification and protection of refugees, and UNHCR has the main normative and operational responsibility for ensuring that refugees receive access to the rights to which they are entitled. In relation to the latter, a range of ILO Conventions set the rights of regular migrant labour and the ILO oversees and advises on states' implementation of these Conventions. In contrast, irregular migration is conventionally treated as a residue category with few rights, from which refugees need to be isolated and protected, but towards which states have few other obligations.

However, as Trygve Nordby, the International Federation of the Red Cross and Red Crescent Societies' (IFRC) Special Envoy on Migration, argued at the High Commissioner's Forum in December 2007, the picture of who has a right to international protection is more complicated than simply distinguishing between refugees and non-refugees. As he suggested, one can identify four groups that comprise irregular migratory flows. As the third layer of the diagram he presented highlights (see, Figure 1), the neglected group of vulnerable irregular migrants requires greater consideration.²⁶

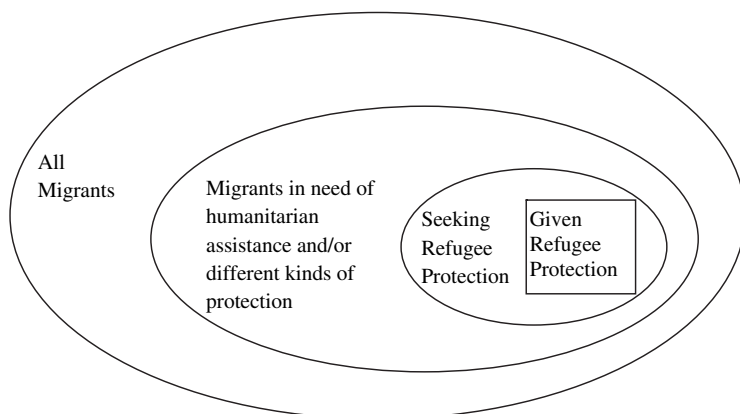


Figure 1 The four groups comprising irregular migratory flows

²⁶ Trygve G. Nordby, IFRC Special Envoy on Migration, Keynote Speech, High Commissioner's Dialogue, above n. 2.

Indeed, irregular migrants have rights and, correspondingly, states have obligations towards irregular migrants who reach their territory or who are under their jurisdiction. Irregular migrants are entitled to human rights both *qua* human beings (under international human rights law) and *qua* migrants (under the existing treaties designed to guarantee rights to migrants). Furthermore, insofar as the situation of irregular migrants means that their own states are unwilling or unable to provide fundamental human rights (such as the right to life), returning those migrants to a country in which there is good reason to believe that these rights would not be met would amount to a violation of those rights by the returning state. *Ergo*, destination and transit states have obligations under international human rights law to ensure that irregular migrants who are within their jurisdictional control have access to international protection where it is required to safeguard human rights. In situations in which return may lead to torture, inhuman or degrading treatment or punishment, this obligation may require the state to allow an individual to remain on its territory so long as there is a risk of him or her being exposed to such treatment in his or her country of origin.²⁷

In practice, however, many irregular migrants do not receive access to the protection to which they are entitled. At a normative level, the interpretation and application of human rights law to the situation of irregular migrants has been limited. The Office of the UN High Commissioner for Human Rights (OHCHR) has had little capacity to engage in the development of guidelines on the relevance of international human rights law to vulnerable migrants, and the treaty bodies for the various human rights instruments have rarely considered the rights of vulnerable irregular migrants. On an operational level, there has been no clearly identified division of responsibility between international organisations for ensuring the protection of vulnerable migrants. Consequently, many people with specific protection needs (and entitlements) are subject to blanket removal orders, extended detention, and return, without access to the protection or services to which they are entitled. Two analytically coherent groups face threats to their human rights which require that they are not immediately returned to their country of origin but that they are identified and receive access to the specific forms of international protection that they require.

2.1.1 Protection needs resulting from conditions in the country of origin unrelated to conflict or political persecution

There is a growing recognition that forced migration may be influenced by the effects of environmental change, state fragility and livelihood failure. In the case of Zimbabwe, for example, very few of the estimated more

²⁷ Cholewinski, above n. 23.

that 2 million people to have left the country in search of asylum between 2005 and 2009 have met the 'persecution' requirements of the 1951 Refugee Convention. Yet, they are not simply voluntary, economic migrants. Rather, in relation to this dichotomy, they are increasingly being referred to within UNHCR as 'neither/nor' and within South Africa as 'mobile and vulnerable people'. Indeed, they might be considered to be 'survival migrants' – persons who are outside their country of origin because of an existential threat to which they have had no access to a domestic remedy or resolution. Their situation does not fit neatly within the existing framework of international refugee law. However, it is nevertheless widely recognised that many of the Zimbabweans in South Africa and Europe face specific vulnerabilities that make blanket return infeasible. Indeed, many of these people face serious economic and social stress as a result of near state collapse, the absence of access to shelter, clean water and sanitation, shelter, and the existence of a serious public health crisis in the context of HIV/AIDS.²⁸

In many cases, returning these people to Zimbabwe would be a clear violation of human rights, such as the right to life, and would again expose them to extreme levels of economic and social distress. At the moment, however, there is no clear consensus or authoritative guidelines on the appropriate response to such 'neither/nor' situations. Different states offer different levels of subsidiary protection but are wary of offering disproportionately generous standards of protection for fear of taking on a disproportionate protection responsibility. In Southern Africa and Europe, therefore, Zimbabweans have little access to protection due to the narrow interpretation of international protection instruments. UNHCR has discussed forms of subsidiary (or 'temporary') protection that might be appropriate in such situations.

Related issues arise from people moving irregularly as a result of severe environmental distress. In the context of climate change, which may serve as a multiplier in exacerbating other causes of forced migration, there is also little understanding or consensus on the human rights and protection requirements of people fleeing serious economic and social distress.²⁹ However, as with the 'neither/nor' situations described above, it is conceivable that such people may face a threat to right to life, at one extreme, or to their economic and social rights, which requires some form of subsidiary international protection. The 'sinking islands' phenomenon highlights an extreme situation in which return would not be possible. Yet it is also

²⁸ Forced Migration Studies Programme, 'Responding to Zimbabwean Migration in South Africa – Evaluating Options', Background Document for 27 Nov. 2007 meeting, University of Witwatersrand.

²⁹ Norwegian Refugee Council, 'Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration' (Oslo: NRC, 2008).

important for the international community to consider the normative and legal standards of protection that are applicable to irregular migrants in less clear-cut situations of environmental change that result in severe economic and social distress.³⁰ Furthermore, a range of situations in which UNHCR has been required to become involved in offering protection following natural disasters – as a result of tsunamis, earthquakes and floods – highlights an additional source of protection needs that are not met by the 1951 Convention.

2.1.2 Protection needs arising as a result of movement

Given the dynamic nature of trans-boundary movement, people's circumstances often change dramatically during transit, irrespective of the initial reasons why they left their country of origin. Refugee status is rarely accorded to people whose vulnerabilities emerge as a result of movement. A number of groups of people, whose circumstances change during transit, nevertheless require international protection, as a result of the experiences they undergo during movement. In particular, three groups of vulnerable migrants have specific protection needs that are frequently neglected by destination and transit countries' attempts to control irregular migration: people who face trafficking, trauma and violence, or who become stranded migrants. However, in each case, these vulnerable groups of migrants have clearly defined rights that entail obligations for destination and transit countries.

There is a clearly defined legal framework addressing the human rights of trafficked human beings, which was reinforced by the Palermo Protocol to the UN Convention against Trans-national Organized Crime (UNTOC). The Protocol offers a clear framework within which prevention, protection, and prosecution in relation to human trafficking can be addressed. Indeed, an authoritative definition of human trafficking exists and there is widespread consensus that states have obligations to ensure the human rights of trafficked human beings.³¹ However, what is less clear is how these rights can be operationally accessed in countries of destination and transit in the context of irregular migration. Furthermore, while UNHCR and national jurisprudence sometimes sees trafficking 'as persecution', case law is mixed in its interpretation.³² Consequently, where trafficked human beings are not seen as refugees, there is a need to consider other forms of subsidiary protection that might be required, in addition to ensuring

³⁰ J. McAdam, 'Climate Change "Refugees" and International Law', paper presented at Refugee Studies Centre Conference, Oxford University, 7-8 Dec. 2007.

³¹ K. Saito, 'International Protection for Trafficked Persons and Those Who Fear Being Trafficked', Working Paper no. 149 (UNHCR: Geneva, 2007); Piotrowicz, above n. 9.

³² Saito, *Ibid.*

that operational mechanisms exist for the identification and referral of trafficked persons within mixed flows.

In contrast, there is currently no legal definition of stranded migrants nor a clear consensus on their rights and the mechanisms through which these rights can be met. Grant explains, 'migrants become legally stranded where they are caught between removal from the state in which they are physically present, inability to return to their state of nationality or former residence, and refusal by any other state to grant entry'.³³ Furthermore, Dowd offers a working definition of stranded migrants as 'those who leave their own country for reasons unrelated to refugee status, but who become destitute and/or vulnerable to human rights abuses in the course of their journey. With some possible exceptions, they are unable or unwilling to return to their country of origin, are unable to regularize their status in the country where they are to be found, and do not have access to legal migration opportunities that would enable them to move on to another state'.³⁴ Stranded migrants exist because of a range of obstacles, including: lack of voluntary return, legal bars to involuntary return, statelessness, unclear identity or nationality, prohibited means of removal. While states have clear obligations under international law to protect the rights of those stranded, these are often not met for both normative and operational reasons.³⁵

Irregular migrants may also have protection needs that result from being victims of trauma and violence during transit. Those who travel long distances and face serious obstacles to transit often suffer brutal violence and severe traumas during transit, examples include being stabbed, shot, left without food or water, raped, doused with chemicals, and abandoned en route.³⁶ These experiences may hinder their capacity to (re)integrate in the host or home country, and therefore they may require forms of support and protection. ICMC, for example, has highlighted the need to develop mechanisms to ensure that medical, psycho-social, protection and referral services are available at points of embarkation, rescue, arrival and readmission.³⁷ The existence of blanket removal orders, extended detention, return without necessary medical, psycho-social or legal support, for example, often undermines vulnerable migrants' access to these sources of support and protection.

³³ Grant, above n. 8, 30-1

³⁴ R. Dowd, 'Trapped in Transit: The Plight and Human Rights of Stranded Migrants', Working Paper No. 156 (UNHCR: Geneva), 4.

³⁵ Grant, above n. 8.

³⁶ European Commission proposal for 'The development of international standards and response mechanisms for the reception and care of vulnerable migrants in mixed flows', EuropeAid/126364/C/ACT/Multi.

³⁷ ICMC, 'Improving Responses to Boat People and Other Migrants Injured or Traumatized Crossing Borders', Apr. 2008.

Finally, forcibly expelled migrants may also face human rights violations and vulnerability. The situation of Congolese migrants forcibly expelled from Angola to the Democratic Republic of Congo (DRC) illustrates this. Between 2003 and 2009, around 300,000 to 400,000 Congolese were expelled in successive waves, often linked to elections within Angola.³⁸ The conditions of deportation have been brutal, often leading to systematic rape and torture.³⁹ With little advocacy or assistance in the Southern regions of the DRC, access to protection, shelter and health facilities has been limited and has mainly been provided by local NGOs and churches. The situation of expelled Congolese highlights the growing complexity of the protection needs of migrants, which are not adequately met under the status quo.⁴⁰

2.2 Lack of guidance for states

Aside from the human consequences of the status quo, the absence of a clear international institutional framework also poses problems for states. Countries of destination and transit currently lack guidance in how to interpret and fulfil their human rights obligations towards vulnerable migrants. States are therefore often left to define their own standards based on their own interpretations of legal norms, often in ways that lead to significant public scrutiny and criticism. Furthermore, on an operational level, the absence of a clear division of responsibility between international organisations means that states lack sources of normative and operational support in relation to reconciling their own migration concerns with upholding their human rights obligations.

On a normative and legal level, there is no clear and authoritative source on how to interpret and apply human rights obligations to the situation of vulnerable migrants. OHCHR's involvement is limited because it lacks permanent staff working on migration and has no field presence to facilitate operationalising human rights norms. Meanwhile, the treaty bodies of the various human rights instruments have rarely offered authoritative guidance on the human rights of vulnerable migrants, generally regarding this to be the preserve of the Committee on Migrant Workers (the treaty body of the International Convention on the Protection of the Rights of All Migration Workers and Members of their Families) and the mandate of the UN Secretary-General's Special Rapporteur on the Human Rights of Migrants. Meanwhile, although IOM frequently offers legal advice to states on how to implement IML, this is done on an *ad hoc* basis according

³⁸ OCHA, '*Point Sur Les Expulses d'Angola au 15.10.09*'.

³⁹ MSF 2007, 'Women Tell of Their Angolan Ordeal', <<http://doctorswithoutborders.org/news/article.cfm?id=2232&cat=field-news>>.

⁴⁰ OCHA, 'Congolese Expelled From Angola', DR Congo Situation Report no. 1, 21 July 2008.

to where states invite IOM to provide such expertise. IOM's advice and training in this area does not, however, translate into a set of authoritative guidelines on how to operationalise human rights standards in the context of irregular migration.

The absence of a clear framework has negative implications for many states. For example, it means that states frequently offer different standards of subsidiary protection and therefore engage in a 'race to the bottom' in order to avoid being more generous or tolerant than other states in the region. Furthermore, the absence of a clear and transparent human rights framework often undermines public confidence and legitimacy in returns and in cooperation agreements with third countries. For example, in the EU context, partnerships with non-EU states of embarkation and readmission – such as Djibouti, Mauritania, Somalia, Turkey, Yemen, or the Maghreb states – are often subject to public scrutiny and criticism because it is unclear whether those partnerships and the readmissions are subject to blanket return orders, on the one hand, or a system that respects the human rights of migrants, on the other hand. Clear guidelines would offer transparency, legitimacy and facilitate the *de facto* harmonisation of standards across states.

On an operational level, the absence of a clear division of responsibility between international organisations means that states have no clearly defined source of institutional support in ensuring the protection of vulnerable migrants. Each state varies in terms of how it identifies and refers vulnerable migrants. A more clearly defined institutional allocation of responsibility could make the process of identification, referral, protection, and return both more efficient and more legitimate than currently. For example, ICMC has identified a clear three-stage process (first aid, recovery and referral), which applies equally to all arrivals regardless of status, in order to allow for proper and effective identification and protection where needed.⁴¹ Having clearly identified operational partners responsible for each stage of such a process would enable states to reconcile their immigration control concerns with their human rights obligations more efficiently and effectively.

3. The case for a 'soft law' framework

'Soft law' represents a form of non-binding normative framework in which existing norms from other sources are consolidated within a single document. Soft law guidelines may, for example, be compiled by drawing upon experts or by facilitating an inter-state agreement on the interpretation of how existing legal norms apply to a particular area. The value of soft law is that it can provide clear and authoritative guidelines in a given areas, without the need to negotiate new binding norms.

⁴¹ ICMC, above n. 37.

The development of a soft law framework has been applied to address gaps in international protection in the past. In particular, there was a longstanding recognition that there were gaps in IDP protection, which ultimately led to the development and negotiation of a set of Guiding Principles on Internally Displaced Persons between 1992 and 1998. During that period, the Representative of the UN Secretary-General for IDPs, Francis Deng, worked together with the legal support of Walter Kälin and with the backing of a small number of states to identify existing normative gaps in IDP protection. Having identified the gaps, they drew upon existing international human rights and international humanitarian law norms to draft a set of Guiding Principles that were subsequently adopted by states as a non-binding framework for interpreting their obligations towards IDPs. These Principles have subsequently been relatively effective in filling protection gaps and meeting the demand of states for clear guidelines and a clear institutional division of responsibility for IDP protection.

In many ways, the situation of vulnerable irregular migrants is analogous. The international community has reached the point at which there is consensus that the international protection of 'people on the move' is no longer simply about refugees. There is a growing recognition that there is a significant gap – at both the normative and especially the operational level with respect to a number of groups of vulnerable irregular migrants. However, as with the IDP case, the relevant human rights norms already exist; they simply require consolidation and application, and a clear division of operational responsibility between international organisations. As with the development of the guidelines on IDP protection, a soft law framework for the protection of vulnerable migrants would have two main features: it would be non-binding and it would clarify the application of the existing legal and normative obligations to the initiative's areas of protection.

3.1 Non-binding

The current historical juncture does not represent an auspicious political climate within which to develop new norms. Few powerful states are predisposed to the negotiation of binding, multilateral norms through a UN framework, and, in the context of state concern with migration and security, this reluctance is even greater with respect to negotiating binding agreements in relation to the rights of non-citizens. In the area of migration, states' reticence to engage in the development of binding norms is evident in a number of areas. The limited number of signatories and ratifying states for the UN Treaty on the Rights of Migrant Workers, the voting patterns at the UN General Assembly in relation to the outcome of the first Global Forum on Migration and Development (GFMD), and the growing use of regional consultative processes (RCPs) that bypass multilateral forums all exemplify the resistance of states to agree new norms in relation to migration.

However, in the case of the protection of vulnerable migrants there is no need to develop new norms through multilateral agreement. The norms within international human rights law exist. However, as was the case with IDPs, non-binding guidelines are required on the implementation and operationalisation of those norms. The guidelines would help states by offering an authoritative and agreed interpretation of the existing standards, while identifying any normative or operational gaps. Over time, the guidelines may become hard law through states adopting them in domestic legislation, as has occurred with IDPs. However, this would only take place at states' own pace and discretion – there would be nothing inherently binding about the guidelines. This non-binding nature would mean that states would have guidance on how to ensure the human rights of irregular migrants. It would mean that they held no obligation to implement the norms and maintained the freedom to comply, or not, with the interpretation of the guidelines, although they would, of course, continue to be bound by the underlying hard law treaties that were consolidated.

3.2 Clarification of existing legal and normative obligations

Although human rights norms relevant to the protection of vulnerable irregular migrants exist and are already signed up to, there are gaps in their interpretation and application, and there is a need to more fully operationalise those norms within a migration context. Agreeing an authoritative legal interpretation of existing human rights standards in the context of informed empirical analysis would help clarify the scope and application of existing norms. Although human rights obligations have relevance for the situation of vulnerable irregular migrants, they have rarely been applied.

Although it has recently set up an in-house 'task force' on migration, OHCHR has limited staff capacity working exclusively on migration issues. Meanwhile, it tends to focus on advocating for the ratification of the International Convention on the Protection of the Rights of All Migration Workers and Members of their Families, rather than on trying to ensure that the human rights of migrants are addressed across the treaty bodies for the other human rights instruments. Consequently, the treaty bodies have a mixed record on considering the human rights of migrants, with the Committee on Economic, Social and Cultural Rights (CESCR), the Committee against Torture (CAT), The Human Rights Committee (CCPR), and the Committee on the Elimination of Racial Discrimination (CERD) being the main treaty bodies to offer some guidance on the rights of irregular migrants.⁴² However, aside from institutional capacity, the

⁴² Interviews with various members of OHCHR staff, Geneva, July 2008; For an overview of OHCHR's migration activities, see, <<http://www2.ohchr.org/english/issues/migration/taskforce/>>.

limitation of relying on OHCHR to develop normative interpretation on the protection of vulnerable migrants is that it lacks an operational presence or experience in the realm of migration. Indeed the dynamic nature of migration means that interpreting and implementing the rights and protection needs of 'people on the move' presents a challenging set of protection issues that OHCHR and the existing treaty bodies are unable to meet alone.

Consequently, there remains a gap in the interpretation of how existing human rights standards apply to the situation of vulnerable irregular migrants. In addition to input from OHCHR, the development of a common understanding of the application of human rights law to irregular migrants would require the input of those actors – such as UNHCR – who have experience of operationalising a rights-based framework for a particular group of people on the move, as well as actors with complementary operational experience in the area of migration, such as IOM and the IFRC.

The context of clarifying the application of existing norms to the situation of irregular migration could open up new possibilities for states to develop a range of efficient and equitable practices for addressing irregular migration, while ensuring that they would be consistent with international human rights standards and the needs of the most vulnerable migrants. For example, the inter-state debates on the development of the guidelines might consider new types of subsidiary protection, which might be temporary in nature, which could be afforded to different categories of vulnerable migrant. Similarly, the context of inter-state dialogue could allow exploration of new forms of burden-sharing, which might enable states to ensure that temporary protection is provided, although possibly in a context that is de-linked from the territory on which the migrant's protection needs are assessed. This would ensure that, rather than imposing a 'blank cheque' protection obligation on states, the guidelines would empower states to meet their existing human rights obligations in the most efficient and equitable manner possible.

These types of 'soft law' frameworks could be developed for the protection of vulnerable irregular migrants as an entire category. Or, more realistically, they could be developed for specific aspects of irregular migration, dividing the broad area of irregular migration into manageable and meaningful areas within which focused and clear sets of principles could be developed. For example, guiding principles might be developed separately for stranded migrants, survival migrants, forcibly deported people, or people who develop vulnerabilities in transit. It is likely that this would make more sense, given the disparate sets of legal and practical issues involved in each area. It would also allow each area of protection to be implemented by different sets of collaborative partners, depending on the type of collaboration germane to the issue.

4. The case for a 'collaborative approach'

In addition to developing a clear and authoritative interpretation of the application of existing human rights norms to the situation of vulnerable migrants, there is also a need to establish who is responsible for 'doing' protection. Indeed, at the level of international organisations, there remains an operational gap with respect to the protection of vulnerable migrants. In particular, which organisations should: a) have responsibility for interpreting the application of rights and obligations in particular situations; and b) have responsibility for being present in the field to ensure access to rights. Most importantly, there is a need for greater clarity in terms of which organisation is responsible, at a field level, for ensuring that mechanisms of identification, referral, protection, solutions, and return are available to states.

Here, the IDP precedent is again instructive. Alongside the Guiding Principle, the process of IDP norm development during the 1990s also led to the creation of an inter-organisational division of labour for implementing the rights of IDPs. Initially, referred to as the 'collaborative approach', through which a range of UN and non-UN agencies shared responsibility for IDPs, this eventually became the 'Cluster' approach, whereby the division of protection, care and maintenance, food provision, and security of IDPs, for example, was clearly allocated across different UN agencies. There is a need for a similarly clear operational allocation of responsibility in relation to the protection of vulnerable irregular migrants. Such a 'collaborative approach' has been piloted in a context relevant to the protection of vulnerable irregular migrants: the 'Lampedusa model', within which IOM, UNHCR, the Red Cross and Red Crescent Societies, Save the Children, and the Italian Government have worked together to ensure that refugees' and irregular migrants' rights are met.

Different types of mechanisms are available to enhance inter-agency collaboration to address existing gaps. The consensus among states is that the existing structure of inter-agency coordination on migration – the Global Migration Group (GMG) – is an effective vehicle for dialogue but cannot be expected to lead to focused inter-agency collaboration. Hence, four other models for collaboration might be considered. One model could involve extending the use of the 'cluster approach', developed by the IASC in 2005 in the context of UN humanitarian reform. This is the approach used to divide lead agency responsibility for different aspects of IDP protection, for example. However, the effectiveness of the cluster approach has been criticised in numerous contexts. A second model might be the appointment of a Special Representative of the Secretary-General (SRSG) on the Protection of Vulnerable Irregular Migrants (or a series of SRSGs on different aspects of the problem) to advocate for migrant protection and to ensure that existing agencies fill existing gaps in protection as and

when they arise. A third model might be the creation of a small, streamlined agency structure with secretariat – along the lines of UNAIDS – to fill the existing gap by working with and drawing upon existing expertise. A fourth model, would be the development of different joint standard operating procedures between agencies. One recent example of this, relevant to the protection of vulnerable irregular migrants, is in the area of human trafficking, in which UNHCR and IOM developed ‘Joint Standard Operating Procedures in Counter-Trafficking’ in late 2009. Whichever model (or models) of collaboration is implemented, a number of existing international organisations and NGOs have important relevant experience that could allow them to play some role in a formal collaborative approach.

4.1 UNHCR

The Office currently has a mandate focused on providing protection and solutions for refugees and IDPs, while working with a number of other ‘populations of concern’. However, it does not currently have the means, capacity or mandate to become a protection organisation for an additional population of concern as ‘vulnerable irregular migrants’. However, it has experience that is highly relevant for the protection of vulnerable irregular migrants, and which can be used to inform the development of a soft law framework. In particular, UNHCR has operationalised a rights-based framework for one particular group of people on the move: refugees. In the context of protecting refugees, it therefore has a wealth of experience in how to operationalise human rights standards to identify and protect vulnerable people who cross international borders. It is already implicated on an operational level in a range of mixed migration situations, such as Lampedusa, Malta and Yemen. UNHCR would not need to alter its mandate and would not need to take on overall operational responsibility for the protection of vulnerable irregular migrants.⁴³ However, it could nevertheless play two important roles. Firstly, it could, alongside other agencies, play a facilitative role in the negotiation of the soft law framework for the protection of vulnerable migrants. Indeed, at the High Commissioner’s Dialogue, UNHCR was given the role of facilitating an initial meeting to examine protection gaps

⁴³ In his opening statement, above n. 2, the High Commissioner made clear that UNHCR is not seeking to extend its mandate to play an operational role in the protection of migrants. He said, ‘I am not seeking an expansion of my Office’s mandate. I do not want UNHCR to assume responsibility for activities that are more properly done by other organizations, particularly the International Organization for Migration. I am not in favour of diluting the fundamental distinction between refugees and migrants, and certainly do not wish to suggest that everyone who is on the move should be considered a refugee. I do believe, however, in the universality and indivisibility of human rights. By creating a global environment in which migrant rights are respected, we will also be creating an environment in which UNHCR can more effectively exercise its mandate for refugee protection and solutions’.

in the context of irregular migration. This is a mandate from states that it has so far refrained from exercising. Secondly, given its operational role in contexts of mixed migration, UNHCR could be available to offer advice and engage in information-sharing with other organisations that would take on direct operational responsibility for the protection of vulnerable irregular migrants.

4.2 IFRC

The International Federation of the Red Cross and Red Crescent Societies (IFRC) has become increasingly involved in addressing the humanitarian needs of vulnerable migrants. The IFRC has, for example, been involved on an *ad hoc* basis in providing humanitarian assistance to vulnerable migrants in the context of the Mediterranean crossings to Europe. The national Red Cross and Red Crescent Societies have provided counselling, identification, referral, and identified subsidiary protection needs. At the opening of the 30th International Conference on the Red Cross and Red Crescent in November 2007, international migration featured on the agenda for the first time. As the President of the International Committee of the Red Cross (ICRC), Dr Jacob Kellenberger, acknowledged in his opening statement, 'Among the topics [addressed by the conference], there is one which is not completely new but appears for the first time in a prominent way on the agenda of the International Conference of the Red Cross and Red Crescent, the issue of international migration'.⁴⁴ The delegates to the conference passed a Resolution on 'International Migration', agreeing that the Red Cross and Red Crescent Societies should play a role in addressing the humanitarian needs of vulnerable migrants, irrespective of their legal status. The Resolution, for example, 'calls upon the components of the [Red Cross] Movement to seek to give more prominence to the humanitarian consequences of migration' and 'requests the ICRC and the IFRC . . . to support the efforts of National Societies to gain access and provide impartial humanitarian services to migrants in need, regardless of their status'.⁴⁵ In July 2008, the IFRC appointed Thomas Linde as its full-time Special Representative on Migration. One challenge for the IFRC will be to see how they and the national societies will interpret and operationalise the November 2007 Resolution. However, the IFRC could be a strong candidate to be the lead operational agency with respect to the protection of some categories of vulnerable irregular migrants.

⁴⁴ Opening Statement by ICRC President, Dr Jacob Kellenberger, 30th International Conference of the Red Cross and Red Crescent, Geneva, 26-30 Nov. 2007.

⁴⁵ Resolution 5 on 'International Migration', passed by the Council of Delegates at the 30th International Conference of the Red Cross and Red Crescent, 23-24 Nov. 2007.

4.3 OHCHR

The Office currently has extremely limited capacity with respect to migration. OHCHR does not work on an operational level and has almost no field presence. Internally, it has no staff working full-time on the human rights of migration. It only has a small 'task force' made up of staff who work across different areas of OHCHR, and which it convenes in order to establish an institutional position with respect to discussions at the Global Migration Group (GMG), for example. Meanwhile, the Office's advocacy position with respect to the rights of migrants has become increasingly marginalised since the agreement of the UN Treaty on Migrant Workers. Because this treaty has received only a small number of ratifications, and has continued to be contested by many developed states, OHCHR's continued focus on the treaty has detracted from developing a clearer understanding of the application of other human rights instruments to the situation of vulnerable irregular migrants. Nevertheless, OHCHR and the UN Special Rapporteur on the Rights of Migrants (currently Jorge Bustamante) could play an important role with respect to the development and implementation of a soft law framework. In particular, they could provide authoritative advice on existing human rights norms and their application to vulnerable migrants. OHCHR would be even more capable of fulfilling this role if it were to create a unit responsible for the human rights of vulnerable migrants, which could work to mainstream migration concerns across the treaty bodies.

4.4 IOM

IOM has important experience and expertise relevant to irregular migration. It has experience in providing training in IML to border guards and state officials, and advising states on how to ensure that their migration policies are consistent with their legal obligations. It has also engaged in a range of specific projects, which have provided operational services in relation to a host of protection functions, both for refugees and irregular migrants.⁴⁶ IOM would therefore have an important operational role to play alongside IFRC. While IFRC's operational focus could be on providing initial referral, identification and treatment to vulnerable migrants, IOM could provide a host of services to states to ensure that an efficient and effective triage system is implemented within transit and destination countries. It could provide a service relating to various stages of the protection process – screening, transportation, resettlement, assistance with voluntary return, etc. These functions are amongst the range of competences that IOM already has. However, it is important that IOM's work is complemented by the other organisations

⁴⁶ IOM (2009).

for two reasons: firstly, IOM's work relies upon states funding specific IOM projects and without specific donor commitments there will continue to be operational gaps that need to be filled by other organisations. Secondly, given that IOM is an exclusively operational organisation and has no normative agenda, it is important to complement its work through the involvement of normative, rights-based organisations within a UN framework.

4.5 NGOs

A range of NGOs have been significantly involved in the protection of vulnerable irregular migrants on both an operational and an advocacy level. In many situations, NGOs are the first organisations to enter into contact with vulnerable migrants and refugees upon arrival. In different geographical contexts, different NGOs have particular operational expertise that could be drawn upon both in developing and implementing the Guiding Principles. Save the Children has been involved in a number of areas, particularly in Lampedusa, where they have been part of the collaborative 'Lampedusa model'. Caritas Djibouti has been particularly active in the Gulf of Aden, and the Jesuit Refugee Service Malta (of whom Katrine Camilleri was named 2007 UNHCR Nansen Award winner for her work on mixed migration and detention) and the Spanish Commission for Refugee Aid, for example, have played a prominent role in their respective regions. Meanwhile, ICMC has offered significant leadership and coordination amongst NGOs at the policy level.

5. The facilitation process

As with the IDP process during the 1990s, the facilitation process for the soft law framework would have two core purposes: a) to develop 'Guiding Principles on the Protection of Vulnerable Irregular Migrants', and b) to establish a clear division of international organisational responsibility for ensuring the protection of vulnerable irregular migrants. The process for developing such a soft law framework would involve two main elements: i) analysis, and ii) inter-state consultation. In the first instance, the process would require significant input from expert advisors, especially on a legal level but also on a political level. This would be necessary to analyse existing normative gaps, and to explore mechanisms for applying and implementing norms. In the case of the development of the Guiding Principles for IDPs, Walter Kälin and his team did significant legal and normative analysis that was made available to states and contributed to persuading them of the need for a new set of Guiding Principles. This analysis was supported by academics, such as Roberta Cohen at the Brookings Institute. In the second instance, the IDP experience also sheds

light on the need to work with states and to develop informal negotiation among states in order to build up consensus on the core elements of the framework. In the IDP case, the process of developing the Guiding Principles was overseen by the Secretary-General's Representative, Francis Deng, and supported by a small coalition of sympathetic states, notably Austria.

5.1 Secretariat

A process of developing a set of Guiding Principles could be facilitated by any combination of UNHCR, IOM, OHCHR, and IFRC, for example. However, it would be more focused if one of these organisations were to take the lead on facilitation. While UNHCR might not necessarily seek to become significantly operationally involved in the protection of vulnerable migrants, it might nevertheless play an important facilitative role. At the High Commissioner's Dialogue in 2007, for example, UNHCR was invited by states to play a 'convening role' and the High Commissioner offered to convene an initial meeting in follow-up to the Dialogue.⁴⁷ This follow-up process could be used to decide on future organizational arrangements and to determine which agency would take the lead facilitating role.

The main convening organisation could then convene a small secretariat to work on the development of the Guiding Principles, which could comprise staff from the agencies with relevant legal and analytical experience, as well as others on secondment from other organisations, governments or academia. As with the Guiding Principles on IDPs, it would be crucial to identify both an excellent and authoritative lawyer, who could play the 'Walter Kälin role', and a charismatic political figurehead, who could play the 'Francis Deng role'. This secretariat could oversee the development of the norms, work to gradually build inter-state consensus on the need for and value of the Guiding Principles, and chair inter-state meetings. Evolving from the High Commissioner's Dialogue, UNHCR could then convene a Working Group of interested parties to develop the Guiding Principles and the basis of the Collaborative Approach. This Working Group could comprise UNHCR, OHCHR, the Special Rapporteur on the Human Rights of Migrants, IOM, IFRC, ICRC, ILO, interested states, and ICMC and

⁴⁷ Chairman's Summary, High Commissioner's Dialogue, above n. 2, <<http://www.unhcr.org/protect/PROTECTION/476146702.pdf>>. Historically, UNHCR has been at its most successful when playing a facilitative and catalytic role, whether across the UN system or in developing norms in relation to refugees – see, e.g., G. Loescher *et al*, *UNHCR: The Politics and Practice of Refugee Protection into the Twenty-First Century* (London: Routledge, 2008); A. Betts and J-F Durieux, 'Convention Plus as a Norm-Setting Exercise' (2007) 20 *JRS* 509-35.

other interested NGOs, for example.⁴⁸ It would enable the secretariat to keep interested parties and states up-to-date with the secretariat's progress and would allow the gradual development of consensus around the Guiding Principles. Once the draft of the Guiding Principles was prepared, it could be affirmed by states acknowledging that they accept the Guiding Principles as a non-binding framework on the application of international human rights law to the situation of vulnerable irregular migrants.

5.2 Issues to consider

In the process of developing the soft law framework, a range of issues would need to be carefully considered by the secretariat and the working group. Some of the key issues and ambiguities that would need to be considered would include, but not be limited to, the following:

1) Which vulnerable irregular migrants?

One of the greatest challenges of developing a soft law framework would be to define 'vulnerable irregular migrants' with a sufficient degree of precision to allow the development of international consensus. At the outset, this article highlighted two main groups of vulnerable irregular migrants for whom there are significant protection gaps: a) those whose protection needs arise during transit (trafficked persons, stranded migrants, those who suffer trauma and violence during transit), and b) those whose protection needs arise from reasons other than conflict or persecution (those fleeing severe economic and social distress, such as state collapse, environmental change or natural disaster). Nevertheless, the process of developing the Guiding Principles would need to clearly define what it meant by vulnerable irregular migrants and which of these groups the framework would address. Would it simply be the former groups, on which agreement would be more likely, or would it include the latter group? The challenge of including the latter group would be that there

⁴⁸ The idea of establishing such a Working Group has been suggested by the Netherlands and publicly supported by the High Commissioner. In his closing statement at the Dialogue, the High Commissioner said, 'Although we have discussed the gaps a great deal, we have not analyzed them in-depth. Many observed that there are contexts in which UNHCR can appropriately play a "convenor role", specifically where the preservation of protection space is at issue. My idea, building on the suggestion just made by the Netherlands, would be to establish an informal working group, involving IOM, ICRC, the IFRC, OHCHR, the ILO, the NGO community and perhaps UNDP. The informal working group should take a more in-depth look into this question of existing gaps, the different agencies that operate and how better cooperation and partnership can address these gaps. This more concrete analysis should take place in an open framework. I would be willing to act as a convenor of such a group, which in my view should not be composed just of agencies. I think States, from different parts of the world, need to be involved'. Chairman's Summary, High Commissioner's Dialogue, above n. 2, <<http://www.unhcr.org/protect/PROTECTION/476146702.pdf>>.

remains a lack of analytical consensus on issues such as climate change-related migration. Further consideration would be required in order to identify those who might be considered to be vulnerable migrants. Meanwhile, economic and social rights remain far more contested than civil and political rights, as a basis for protection claims.⁴⁹ Another consideration would be whether 'vulnerable migrants' would include only those who cross an international border or also those who remain within their country of origin (in IDP-like situations). Serious consideration would therefore need to be given to the definition of a vulnerable irregular migrant and to which groups would be addressed by the Guiding Principles. Irrespective of these concerns, it seems logical and practically desirable that the broad area of vulnerable irregular migration should be addressed through a series of different sets of guiding principles.

2) *What levels of protection?*

One of the key considerations of the process would be to identify what types and levels of protection should be made available to different groups of vulnerable irregular migrants. Which rights would be involved and what would be the content of the protection provided to different groups of vulnerable migrants? These are central issues that the process would need to address. The forms of complementary or subsidiary protection that would be made available would not need to be expressed in the language of refugee protection and would not necessarily need to offer permanent or even long-term protection. Rather, in many cases, it may be sufficient to identify forms of temporary protection, of the type made available to Kosovar refugees evacuated from Macedonia in 1999, or through Australia's Temporary Protection Visa. South Africa, for example, uses its domestic migration law to provide a form of subsidiary protection to certain non-refugees by occasionally offering 'temporary regularisation' for irregular migrants. Such an approach might allow states to meet immediate protection needs on a humanitarian basis without tying themselves to providing indefinite sanctuary or permanent residence to vulnerable migrants.

3) *What operational mechanisms?*

One of the main goals of the process would be to identify operational mechanisms for ensuring that protection was available to vulnerable migrants. While the relevant international human rights norms may exist, adequate processes for operationalising those rights do not. In particular,

⁴⁹ M. Foster, 'Non-refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law', 2009, *New Zealand Law Review* (forthcoming).

best practices on referral, identification, initial treatment and counselling, protection, durable solution, and return would need to be developed. The most efficient and effective practices could be informed by input from organisations who have considered many of these issues, such as ICMC, IFRC and IOM. Different groups of irregular migrants would probably require different types of operational response.

4) What burden-sharing?

The protection of vulnerable migrants could be linked to some form of burden-sharing mechanism. Vulnerable irregular migrants identified on a given state's territory would not necessarily have to remain on the territory of that state. Rather, protection could be de-linked from territory and forms of temporary or subsidiary protection provided through resettlement. The USA, for example, has begun to play a small but important role in resettling refugees from Malta in order to reduce the burden on one transit country and to provide Malta with an incentive to improve its reception and protection standards. There would be a need for third countries to similarly underwrite the protection costs borne by transit countries that identify vulnerable migrants. Furthermore, in cases where durable solutions other than return were required, it would be important to ensure that responsibility for providing these was equitably distributed between states.

5) What division of international organisational responsibility?

A central contribution of the process would be to ensure a clear division of international organisational responsibility for the protection of vulnerable irregular migrants. As has been noted, UNHCR, IFRC, IOM, and OHCHR may all have different types of contributions to make. Similarly, other members of the Global Migration Group – such as ILO or UNCTAD – and a range of NGOs might also be involved in taking on aspects of the normative or operational implementation of the Guiding Principles. As with the development of the Guiding Principles for IDPs, however, the specific division of responsibility should be kept separate from deliberations on the actual soft law framework, and would probably come afterwards. Such a division of responsibility might follow the collaborative approach, or the later cluster approach, adopted in order to divide international responsibility for the protection of IDPs.

6. Conclusion

The discourse on international protection in the context of human mobility now goes far beyond a focus just on refugees. Refugees represent just one group of 'people on the move' who have protection needs and

to whom states have obligations under international human rights law. However, there remain significant gaps in the protection of vulnerable irregular migrants. The situation of irregular migrants in a number of high profile cases – the Mediterranean, the Atlantic, the Gulf of Aden, Zimbabweans in South Africa, and Congolese expelled from Angola – serves to illustrate these gaps. Beyond refugees, two groups of vulnerable migrants face currently unfulfilled protection needs: a) people with protection needs resulting from conditions in the country of origin unrelated to conflict or political persecution, and b) people with protection needs arising as a result of movement.

In both cases, there is no need to develop new binding norms. The broad international instruments already exist in international human rights law. However, two problems remain. Firstly, on a normative and legal level, there is an absence of interpretation and application of these norms to irregular migration. Secondly, on an operational level, there is no clear guidance on how to implement those norms efficiently and equitably, or on the appropriate division of responsibility between international organisations.

A new soft law framework could contribute to addressing these gaps. It could facilitate the development of clear guidelines on the protection of vulnerable irregular migrants and offer states greater institutional support in efficiently ensuring that these protection needs are met. The precedent of developing a normative framework on the protection of IDPs during the 1990s offers a useful illustration of the contribution a soft law framework might offer. The framework itself could provide authoritative but non-binding guidance to states, while also allowing a set of common understandings and practices on issues such as ‘temporary protection’, ‘burden-sharing’ and ‘durable solutions’ for vulnerable irregular migrants to emerge. As with IDPs, it could also lead to the creation of a ‘collaborative approach’, clearly outlining the organisational division of responsibility for the protection of vulnerable migrants.

In order to facilitate the development of the ‘Guiding Principles on the Protection of Vulnerable Irregular Migrants’, a process similar to the IDP process would be required. This could be co-convened by, for example, any combination of UNHCR, OHCHR, IFRC, and IOM. However, in order to ensure clear leadership and direction, it would make sense for a single organisation to take on that facilitative role. The organisation that takes on this role could then convene a small secretariat to facilitate the analytical and political process of developing the Guiding Principles. Its work could be usefully guided by drawing upon the lessons and insights of the process of developing the Guiding Principles on Internal Displacement.